Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	**WC Docket No. 04-36**
	)	
	)	
Petition of SBC Communications Inc. for	)	**WC Docket No. 04-29**
Forbearance Under 47 U.S.C. § 160 from	)	
Application of Title II Common Carrier	)	
Regulation to "IP Platform Services"	)	

MCI REPLY COMMENTS

Alan Buzacott
Kecia Boney Lewis
MCI, Inc.
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6270

Mark D. Schneider
Marc A. Goldman
Jenner & Block
601 13th Street, N.W.
Washington, D.C. 20036
(202) 639-6005

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EXECUTIVE SUMMARY

MCI continues to urge the Commission to adopt a layers-informed approach to resolve the key issues raised in the Notice of Proposed Rulemaking. The record developed thus far exhibits general support for MCI's position that regulating IP-based services is best analyzed through a "layers" model. Indeed, the record reflects agreement with MCI that: 1) IP enabled services are information services; 2) they are either inherently interstate or have an inseverable interstate component; 3) state regulation of these services is preempted; and 4) that the Commission's jurisdiction over these services is for the most part limited to the ancillary jurisdiction provided by Title I of the Communications Act.

In addition, commenters agree that the layers approach acknowledges that IP decouples services from the underlying transmission medium. Tailored regulation of bottleneck transmission services is the predicate for deregulation of all services that made use of bottleneck transmission facilities. Maintaining Title II and *Computer Inquiry* requirements until the bottleneck is broken is the key to effectuating Congress' goal to have an Internet that is free of regulation as much as possible.

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MCI REPLY COMMENTS

MCI, Inc. (MCI) hereby submits its reply to comments on the Notice of Proposed Rulemaking (NPRM) in the above-captioned dockets.

The opening comments exhibit a developing consensus concerning the policy framework that should govern resolution of the principal questions posed in this NPRM. Thus many commenters agree with MCI on four key issues: 1) that IP enabled services are information services; 2) that they are either inherently interstate or have an inseverable interstate component; 3) that state regulation of these services is preempted; and 4) that the Commission's jurisdiction over these services is for the most part limited to the ancillary jurisdiction provided by Title I of the Communications Act.

The state commenters are virtually alone in arguing to the contrary that IP-enabled voice services are telecommunications services subject to state jurisdictions. Their views find support neither in other parties' comments nor in Commission precedent. IP-enabled services are applications that ride on top of telecommunications services, but these services do not satisfy

either the statutory definition of "telecommunications services" or the Commission's precedents regarding telecommunications services. On the other hand, IP-enabled services satisfy the statutory and regulatory definitions of "information services."

While the states misconstrue Commission precedent to assert jurisdiction they do not have, the wireline incumbents make unsustainable empirical claims to support their interest in deregulating their broadband telecommunications networks. But even here there is largely consensus about the policy considerations that should apply as the FCC considers the extent to which it should regulate broadband networks.

Most commenters thus embrace MCI's principal policy point that regulation of IP-based services is best analyzed through a "layers" model. IP-based voice services are applications layer technologies that are properly deregulated for all providers, including those who control the broadband transmission layer. In turn, the need for tailored economic regulation of the transmission layer depends upon whether competitive forces alone can assure open access to transmission services.

Several ILECs nominally dispute the utility of the "layers" framework. However, their real objection is to the empirical claims made by MCI and endorsed by most commenters that broadband transmission facilities remain in the monopoly (or duopoly) grip of the ILECs (and in many residential markets, the cable companies). The ILECs' contrary claim that broadband last-mile facilities are subject to competitive supply finds no support in the record and, in any event, does not disturb the overall utility of the layers approach. In particular, the Commission cannot deregulate broadband transmission last-mile facilities based on alleged wireless and power line competition that does not yet exist in meaningful ways outside of the laboratory.

I. The Commission Should Use a Layers-Informed Policy Framework

There is broad support among commenters for using a network layers framework to analyze the public policy issues associated with IP-enabled services. Under the layers approach, networks are conceptualized as a horizontal stack of protocol-defined layers, each of which corresponds to different network functions that may be offered in relatively distinct markets. That approach essentially tracks the underlying architecture of IP-based services, under which networking functions are allocated among well-defined modules or layers, each of which builds on the functions provided by the layer below.

Commenters emphasize that the layers approach is robust and sustainable because it reflects the underlying architecture of the Internet. For example, PointOne urges the Commission to use a layers approach because it "respect[s] the basic layered approach to IP network design."[1] By contrast, as commenters show, regulatory approaches that reflect legacy network architectures are not sustainable. For example, as Vonage explains, "any regulatory rubric that does not factor in the economic structure of a particular market will distort rather than enhance its operation."[2]

In contrast to SBC,[3] most commenters emphasize that the layers approach fully recognizes the fundamental reality that IP decouples services from the underlying transmission medium. Vonage points out that, "[i]ncreasingly, any and all applications can run on any and all . . . physical mediums."[4] By analyzing the policy issues associated with applications and content without regard to the underlying transmission technology, the layers framework avoids "silo-

[1] PointOne Comments at 1.

[2] Vonage Comments at 6.

[3] Petition of SBC Communications Inc. for Declaratory Ruling Regarding IP Platform Services, WC Docket No. 04-29 at 28 (filed Feb. 5, 2004) (defining "IP platform services" to include both IP applications and services as well as IP networks and facilities).

[4] Vonage Comments at 7.

based" distinctions based on transmission technology that are no longer sustainable in an IP-based world. PointOne emphasizes that "a layered approach to regulation will enable the Commission to apply the same or similar regulations to similar services or functionalities without regard for the technology platform or legacy regulation resulting from use of that platform."[5] Similarly, 8x8 shows that "a network layer model best enables the Commission to continue its efforts to rationalize the regulatory treatment of different technologies that are subject to varying and sometimes conflicting statutory or regulatory mandates."[6]

Commenters also emphasize that the layers approach avoids the need to make increasingly arbitrary distinctions between services. Because IP can support an array of different services, and can support new services that blur the lines between formerly distinct services, Vonage warns that "any attempt by the Commission to classify and regulate each set of applications that meet certain criteria is doomed to failure both because of the time it takes for any regulatory body to make factually intensive decisions and because of the ability of network and software designers to create new architectures."[7] For that reason, Nuvio states that "any effort to categorize IP-enabled services based on functionality or features will prove counterproductive."[8]

In particular, as the comments show, regulatory classifications based on the provision of voice service would not be sustainable. From an engineering perspective, voice is one of many different kinds of information that can be carried by IP packets. Therefore, as Qwest explains,

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[5] PointOne Comments at 20.
[6] 8x8 Comments at 8.
[7] Vonage Comments at 6-7.
[8] Nuvio Comments at 4.

voice is "simply another application offered by IP-enabled services."[9] Nuvio explains further that "it is ultimately futile if not counterproductive for the Commission to attempt to distinguish between VoIP services."[10] Consequently, the correct approach to public policy is to treat voice, in the first instance, as just another application of IP-based networks.

Commenters agree that, by applying the layers model, the Commission can appropriately target regulation in response to undue market concentration. For example, like other application-layer functions, IP-based voice applications are potentially competitive so long as all competitors have access to the underlying transmission networks upon which the applications ride. Therefore, rather than apply legacy economic regulation to IP-based voice applications, commenters agree that the Commission should target economic regulation to the layer where competition currently is limited – the physical access layer.[11] As Vonage explains, the Commission "should narrowly target regulations that prohibit such firms from using their control over bottleneck facilities to engage in unfair practices in order to obtain market share in the content and application layers."[12] Similarly, joint commenters Cbeyond, GlobalCom and Mpower state that the layers approach "could accommodate application of appropriate regulatory requirements to the bottleneck physical layer possessed by incumbents while affording flexibility and fine tuning for regulation of higher layers."[13]

The only two parties to argue against Commission use of a layers framework – SBC and Verizon – fail to demonstrate any infirmities in the layers model. Indeed, neither Verizon nor

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[9] Qwest Comments at 9..

[10] Nuvio Comments at 5.

[11] *See*, *e.g.,* Level 3 Comments, WC Docket No, 04-36, 03-266, at 26-29; AT&T Comments at 16-20; Z-Tel Comments at 4-16, 19.

[12] Vonage Comments at 9.

[13] Cbeyond Communications, LLC, GlobalCom, and Mpower Communications Corp. Comments at 5.

SBC seriously challenge the principles underlying the layers model or the structure of the model. Verizon, for example, admits forthrightly that there are "sound engineering reasons to distinguish among the "physical layer," the "logical layer," the "applications layer" and the "content layer."[14] SBC's only criticism is the claim that a layers model would be unstable because "there is no consensus about how to define the layers of Internet-related communications for regulatory purposes. . . ."[15] But that statement is untrue: while there may be small differences between the layers-based models that have been proposed, minor differences in the number of layers and slightly differing conceptions of which functions might be assigned to each layer do not undermine the validity either of the layers concept or, more importantly, the cogent insights that may be drawn from layers models. In fact, the article that SBC cites as support for its claim that layers models suffer from shortcomings explicitly concludes that "a consistently applied layered model is indeed a desirable long-term solution."[16]

It is clear from their comments that SBC and Verizon's real concern is not with the layers model itself, but with one of the results of MCI's proposed application of the layers model: the inescapable conclusion that the *Computer Inquiry* regulations remain necessary because the physical access layer is not competitive.[17] But SBC and Verizon's apparent unhappiness with that conclusion does not in any way undercut the validity of the model itself. Instead, it raises a critical empirical question that the Commission faces here: whether there is sufficient competition in the last-mile broadband physical layer such that regulation of that physical layer is no longer necessary.

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[14] Verizon Comments, WC Docket No. 04-36, WC Docket No. 04-29 at 19.
[15] SBC Comments at 61.
[16] Joshua Mindel, *Refinements of a Layered Model for Telecommunications Policy*, 1 J. Telecomm. & High Tech. L. 69, 71 (2002).
[17] SBC Comments at 62-63; Verizon Comments at 19-20.

Most commenters agree with MCI that existing competition among broadband physical layer providers is inadequate. In residential markets there is at best a duopoly between cable and DSL, and as the Commission has repeatedly recognized, duopoly conditions are not sufficient to constrain prices or to prevent the duopolists from using their market power to constrain competition in markets that rely on these last-mile facilities.[18] In enterprise markets, the ILECs continue to have a virtual monopoly on broadband last mile facilities. While modalities such as wireless broadband and power lines offer the prospect of the kind of competition in broadband last mile facilities that would make further economic regulation unnecessary, these technologies are not broadly available and utilized in the marketplace, and so cannot now be relied on to discipline the market. The Commission cannot rationally deregulate broadband bottleneck networks today based only on predictions about competition that may or may not develop in the future.

The foundation of Commission policy in this area is that tailored regulation of bottleneck transmission services is the predicate for deregulation of all services that made use of bottleneck transmission facilities. Maintaining that policy until the bottleneck is broken is the key to implementing Congress' judgment that the Internet should remain free of regulation to the greatest extent possible.

II. IP-Enabled Services Are Information Services

With the exception of state commissions and a smattering of other commenters, there is widespread agreement that all (or nearly all) IP-enabled services, including voice services, are information services that are very different than basic voice services provided over circuit-switched networks. Because voice is just another application that rides on top of the

[18] *EchoStar-DirecTV Merger Order*, 17 FCC Rcd. 20559, ¶ 103 (2002); *Mass Media Order*, 18 FCC Rcd. 13620, ¶ 289 (2003).

transmission facilities, there is no reason to impose Title II regulations on IP-based voice services, rather than directly regulating the provision of the transmission itself. This is especially so because, as the Commission indicated in the NPRM, and as almost all providers of voice services agree, IP-based voice services are increasingly interwoven with other IP-applications.[19] Z-Tel points out the difficulties in trying to define particular types of IP-enabled services as telecommunications services.[20]

Some commenters disagree and argue that many VoIP services are telecommunications services. The California PUC argues, for example, that if an end user can control the form and content of the information transmitted, and specify the origination and destination points, then the service is a telecommunications service regardless of the protocol used.[21] NARUC similarly argues that if a service uses North American numbering plan numbers and the PSTN, it is a candidate for Title II regulation.[22] Even these state commenters acknowledge, however, that IP-enabled services falling outside of these categories are information services.[23]

As for the services falling into these categories, the state commenters ignore the fact that for VoIP services, unlike ordinary POTS services, the application layer is readily separable from the transmission component, and it is the latter that readily fits the statutory definition of telecommunications. The IP layer, in contrast, inherently offers end users capabilities for generating, acquiring, and processing information and thus fits the definition of an information

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[19] Qwest Comments at 19-22; SBC Comments at 32-35; 8x8 Comments at 16-19; Covad Comments at 17; Comcast Comments at 13-16; Cablevision Comments at 10-11; Wisconsin Electric Comments at 4-5.

[20] Z-Tel Comments at 2-4, 6-13.

[21] CA Comments at 23-24. *See also* MN Comments at 7; NY Comments at 4-6; NASUCA Comments at 5.

[22] NARUC Comments at 5-6.

[23] *See, e.g.*, Ohio Comments at 12.

service. In many instances, the VoIP provider does not even provide the transmission. Equally important, the very features these commenters believe meet the definition of a telecommunications service are increasingly offered in conjunction with features that indisputably meet the statutory definition of an information service. And the Commission has long concluded that any service with an information service component is itself an information service,[24] which is why the Commission reached the conclusion it did in the Pulver.com decision.[25]

Additionally, most state commenters fail to discuss the protocol conversion that is a part of any VoIP service that permits computer-to-phone telephony. This protocol conversion alone makes those services information services,[26] as at least one state commission acknowledges.[27] A few commenters suggest that protocol conversion is irrelevant because, in their view, it merely facilitates the offering of the basic service itself.[28] But the Commission has long reached a different conclusion because such conversion involves the processing of information and thus meets the definition of an information service.[29]

Sprint argues that if VoIP providers are considered information service providers they will have no access to telephone numbers, no access to UNEs, and no interconnection rights.[30] But the very fact that the VoIP providers themselves are arguing in favor of an information service classification suggests that these are not significant concerns. This is because many of

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[24] Stevens Report at ¶ 75
[25] Pulver at ¶¶ 11-12.
[26] SBC Comments at 32-35.
[27] Ohio Comments at 12.
[28] Sprint Comments at 18.
[29] *Computer II* at ¶¶ 97-99; *Non-Accounting Safeguards Order*, 11 F.C.C.R. 21905 ¶ 106; *AT&T Order*, ¶¶ 1, 11. *See also* Vonage Comments at 30-32.
[30] Sprint Comments at 19-20.

these rights are not limited only to telecommunications services providers, and information service providers enjoy other rights derivatively through the underlying telecommunications service providers upon whose services their information services ride. For example, the physical interconnection between and among physical networks is indeed a critical prerequisite for competition. However, it is the underlying physical networks that need to be interconnected; information service providers merely take advantage of interconnection rights of their network service providers. Finally, to the extent necessary, the Commission could assert its ancillary jurisdiction to ensure IP enabled services providers have whatever additional rights they need to provide the services they seek to offer, as we explain further below.

This would be far better than the alternative that some commenters suggest – a Commission decision to assert Title II jurisdiction over providers of IP-enabled services and then to forbear in instances where regulation is undesirable. That would be exactly backwards both as a statutory and as a policy matter. For the reasons explained above, it would distort the statutory definitions of telecommunications services and information services to define IP-enabled services as fitting the former category. And as a policy matter, the strong presumption should be *against* regulation of IP-enabled services especially given the success of this policy to date. But if the Commission were to define such services as within the ambit of Title II, it would then *have* to apply all Title II regulations to such services except in instances where it concluded that all of the statutory requirements for forbearance have been met.

III. The Commission Should Reiterate that State Regulation of IP-Enabled Services Is Preempted

It follows ineluctably from the conclusion that IP-enabled services are information services with an inseparable interstate component that state regulation of those services is

preempted, as most commenters agree.[31] State law is preempted whenever it is an obstacle to the accomplishment and execution of the full objectives of Congress.[32] Regulation of IP-enabled services indubitably conflicts with both the express objectives of Congress and of this Commission, as the Commission's longstanding precedent makes clear, because subjecting IP-enabled services to a patchwork of state regulations would dramatically reduce deployment of such services.[33]

Indeed, unlike other businesses, providers of IP-enabled services attempting to comply with multiple state regulations would have to comply with regulations of each state for every communication regardless of where it originates, because they could not readily determine where a communication originates or terminates. They would thus always have to comply with the most arduous regulation of the 50 states and perhaps even with conflicting regulations. As AT&T puts it, the "nomadic" nature of the Internet makes these services inseverably interstate, and renders state regulation inherently disruptive of federal policy.[34]

A few state commenters nonetheless argue against preemption. Most prominently, California cites a number of statutory provisions for the proposition that the 1996 Act preserves state authority.[35] But these provisions generally preserve state authority only over intrastate telecommunications services, not information services; many, such as those in section 253, state only that "[n]othing *in this section*" shall limit state authority, and they also do not preserve state authority when state regulation would thwart legitimate FCC policy goals. These provisions

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[31] *See, e.g.* Qwest Comments at 30-34, SBC Comments at 43-47; BellSouth Comments at 11-14; USTA Comments at 34-36 8x8 Comments at 12-15.

[32] *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986).

[33] *See, e.g.*, BellSouth Comments at 14; Cablevision Comments at 11-13.

[34] ATT Comments at 43.

[35] CA Comments at 31-34.

vitiate neither Congress' express preemption of state regulation of information services nor that of this Commission.

Indeed, state regulation of IP-enabled services would conflict both with Congress' express intent to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation,"[36] and Congress' directive in section 706 that the FCC should encourage deployment of advanced services. In these statutory provisions, Congress codified the prior conclusions of this Commission. The Commission has long made clear that "states. . .may not impose common carrier tariff regulation on a carrier's provision of enhanced services."[37] The Commission cited this line of authority with approval in paragraph 17 of the Pulver Order, and it is strongly supported in the opening comments here

The California commission argues, however, that the calling patterns of most residential customers using VoIP services will be like their calling patterns using POTS and thus much of the service will still be intrastate.[38] But even if true – and there is no basis to assume this – this would not change the fact that IP-enabled services have an inseparable interstate component. California then asserts that the physical location of the calling and called parties can be identified. But commenters providing such services agree that it is not now possible to separate out the intrastate and interstate nature of IP-enabled services given the portability of such

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[36] 47 U.S.C. 230(b).

[37] *In re Amendment to Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 88 F.C.C.2d 512, par 83 n.34 (1981) ("Computer III") (preempting state law to assure that enhanced service providers remain "free from public utility-type regulation"), *aff'd*, *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 196, 206 (D.C. Cir. 1982) ("For the federal program of deregulation to work, state regulation of . . .[interstate] enhanced services had to be circumscribed.").

[38] CA Comments at 34-38.

services, and that forcing providers to develop the technology to do so would, even if possible, be to impose a costly and wholly unnecessary expense.[39]

California further contends, however, that this issue of physical location can be resolved through statutory presumptions such as adoption of a safe harbor of 28%/72% for funding federal universal service programs.[40] But even if such assumptions could be made for universal service, they would not resolve the problem with state regulation more generally. As noted above, that problem is particularly severe because, given the inability of providers to identify the origin and termination of communications, they would have to comply with regulations of each state on every communication. Although some states claim that they intend to regulate with a light hand, and suggest the FCC should only preempt on a case-by-case basis, the very possibility of regulation in each state will severely inhibit development of IP-enabled services. The Commission should therefore reaffirm its decades-old conclusion that state regulation of information services with an interstate component, including IP-enabled services, is preempted.

IV. The Commission Has Ancillary Jurisdiction to Regulate Core VoIP Services

Assuming the Commission properly concludes that IP-enabled services are information services and that state regulation is therefore preempted, the question remains whether the Commission has any authority to regulate these services in the rare instance where it may prove necessary. There is significant disagreement among commenters on the scope of the Commission's authority to regulate. Some commenters argue that the Act's general policy against regulation of the Internet and its express distinction between telecommunications services and information services mean the Commission has no authority to regulate the Internet

[39] Qwest Comments at 30-34; SBC Comments at 26-32; Verizon Comments at 31-42; Vonage Comments at 16-20; 8x8 Comments at 11-12; AT&T Comments at 24; NECA Comments at 12-13; Alcatel Comments at 10; Cisco Comments at 5.

[40] *Id*. at 34-38.

at all. Others argue that this statutory background creates a presumption against Commission regulation of the information services but permits the Commission to regulate where necessary.

The truth, as MCI explained in its Comments, lies somewhere in between. Title I permits regulation that: (1) preserves and protects the Commission's jurisdiction over common carriers; or (2) extends existing statutory requirements to providers of services that are close substitutes for those provided by common carriers. Outside of these circumstances however -- which largely exist only with respect to certain VoIP services using NANP numbers -- the Commission has no authority to regulate. And even where the Commission has such authority, the statutory background creates a presumption against regulation of IP-enabled services.

A few commenters argue that the statute does more than create a presumption; it precludes the Commission from regulating information services altogether. These commenters generally make this argument in an effort to persuade the Commission that if it wants to regulate IP-enabled services at all, it must classify them as telecommunications services.[41] But this argument is wrong, at least with respect to VoIP services using NANP numbers. The view of these commenters would effectively read Title I out of the Act altogether and would correspondingly render the Commission's ancillary jurisdiction a null set. Courts have repeatedly made clear, however, that Title I confers on the Commission jurisdiction that goes somewhat beyond the explicit authority granted in other Titles of the Act. This authority includes in at least some instances the authority to regulate information services.[42]

California asserts that "if the FCC reclassifies an ILEC's underlying transport service used to connect to the Internet as an information service, the FCC will have removed the

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[41] California Comments at 39-40; Vermont Comments at 22-25; Sprint Comments at 27.

[42] *Computer and Communications Industry Ass'n v. FCC,* 693 F.2d 198, 213 (D.C Cir. 1982) ("*CCIA"); GTE Service Corp. v. FCC*, 474 F.2d 724, 731 (D.C. Cir. 1973).

predicate Title II transport service upon which the FCC's Title I authority depends."[43] But under the layers approach, it is clear that the underlying transport service will always remain a telecommunications service that must be offered separately. California's comment merely points out one of the reasons why it is critical that the Commission use the layers framework in analyzing the issues presented in this rulemaking. Other commenters (primarily the Bell Operating Companies ("BOCs")) make the opposite mistake. They point to the broad language in Title I and court rulings, noting the Commission's authority to accommodate dynamic new developments, to argue that the Commission has relatively expansive authority to regulate under Title I. At times, the BOCs appear to argue that this authority is virtually limitless,[44] although at other times they seem to recognize that there are some significant limits. (Importantly, they also agree with MCI that the Commission generally should not exercise whatever Title I authority it has).

The view that the Commission's ancillary jurisdiction is virtually limitless is just as inaccurate as the view that the authority is virtually nonexistent. If Title I granted virtually unlimited authority to regulate communication by wire, then the other titles of the Communications Act would be nothing more than limits on the Commission's otherwise unfettered discretion to regulate communications without any further guidance whatsoever. These titles would express direction to the Commission on how to regulate telecommunication services, broadcast services, and cable services, but no comparable direction would exist for information services. Thus, the Commission would be left with *greater* authority to regulate information services than other services. This would turn the Act's regulatory scheme on its head. And such a reading of the Act would be particularly inappropriate in the case of Internet

[43] CA Comments at 39.

[44] BellSouth Comments at 30; SBC Comments at 53-54.

services given that these services are not a dynamic new service of a type unforeseen by Congress, but rather one for which Congress expressed its intent to adopt a policy of non-regulation.

Instead, as the BOCs at times acknowledge, the Commission's ancillary jurisdiction is limited to that "reasonably ancillary to the effective performance of the Commission's various responsibilities.'"[45] The BOCs articulate principles for evaluating this not dissimilar from those propounded by MCI. SBC, for example, asserts that the FCC can regulate IP-enabled services if they "have a direct effect on the quality and sustainability of the PSTN" – in other words, if doing so is necessary to protect the PSTN.[46] Where SBC is mistaken is in suggesting that any regulation of IP-enabled services could be seen to protect the PSTN since such services now "promise to replace and draw traffic from the PSTN."[47] Rather, there is a powerful presumption against broad assertion of ancillary jurisdiction, which therefore is justified based only on "detailed findings" showing a threat to the PSTN.[48] While it might be possible to make detailed findings that particular regulations of particular IP-enabled services are necessary to protect the PSTN, it is certainly not possible to conclude as a general matter that any regulation of any IP-enabled service meets this test.

SBC further agrees with MCI that the Commission has authority to act to promote statutory policies.[49] But SBC ignores that this authority is limited to services that are "enmeshed in," "comparable to," "essentially indistinguishable from" and "directly competitive with"

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[45] *See, e.g.*, SBC Comments at 53.
[46] *Id*. at 53.
[47] *Id*. at 54.
[48] *CCIA*, 693 F.2d at 213.
[49] SBC Comments at 54.

services in the market over which it has express authority.[50] As MCI explained, the only services that meet this criterion are voice services where customers are assigned a number on the North American Number Plan and where the service is sold and understood to be a substitute for voice service.

Ultimately, the difference between MCI and the BOCs on this point are less important than their similarities, because almost no commenter – even those who suggest the Commission has the authority – actually argues for regulation of IP-enabled services outside the context of VoIP services. For example, SBC argues that only voice services that connect to the PSTN and use NANP numbers would be services where the Commission should consider imposition of numbering or number portability rules.[51] And even the state commissions do not generally argue for regulation of services other than those they consider substitutable for POTS services.

Importantly, there is also strong support for the proposition that even where it is appropriate for the Commission to consider imposition of regulations, it should do so only after taking account of the strong statutory presumption against regulation and the ability of the market to create solutions in this quickly evolving area.[52] In general, it would be premature for the FCC to exercise its ancillary jurisdiction at this stage,[53] as MCI showed in discussing specific types of possible regulation.

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[50] *United States v. Midwest Video Corp.*, 406 U.S. 649, 667 (1972) (Burger, C.J., concurring); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979); *National Ass'n of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 616 (1976).

[51] SBC Comments at 58-60.

[52] *See, e.g.*, Qwest Comments at 38-39.

[53] Se*e, e.g.* 8x8 Comments at 19-25,

CONCLUSION

For the foregoing reasons, MCI urges the Commission to act consistently with the positions set forth herein.

Respectfully submitted,

/s/ Mark Schneider

Mark D. Schneider
Marc A. Goldman
Jenner & Block
601 13th Street, N.W.
Washington, D.C. 20036
(202) 639-6005

Alan Buzacott
Kecia Boney Lewis
MCI, Inc.
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6270

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